IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:16.04.2007

CORAM

THE HONOURABLE MR. JUSTICE P.JYOTHIMANI

Second Appeal Nos.463 & 464 of 2006

V.Subramaniam . . Appellant/Respondent/
Defendant in both appeals

Versus

T.Krishnan . . Respondent/Appellant/Plaintiff
in both appeals

Prayer: These second appeals are filed nder Section 100 of CPC against the judgment and decree dated 31.01.2006 on the file of the Fast Track Court-III, Additional District and Sessions Court, Chennai in A.S.Nos.506 & 507 of 2004 respectively reversing the judgment and decree dated 22.4.2004 made in O.S.No.5099 of 1991 and O.s.No. 8169 of 1989 on the file of the VI Assistant Judge, City Civil Court, Chennai.

For Appellant :Mr.S.V.Jayaraman Senior Counsel
for Mr.K.V.Sundara Rajan
For Respondent :Mr.S.Parthasarathy Senior Counsel
for Mr.S.Vijayakumar

JUDGMENT

The defendant in O.S.No.5099 of 1991 is the appellant in S.A.No.463 of 2006 and he was the plaintiff in the suit O.S.No.8169/1989 against which, he has filed S.A.No.464 of 2006.

2.The respondent herein has filed the suit in O.S.No.5099 of 1991 for declaration in respect of Plot No.3, T.S.No.2/5, measuring around 2400 Sq.ft., vacant land with a hut, compound wall and well in S.No.61/3 and S.No.61/4, Block No.14, measuring 72 feet and 6 inches in East-West and measuring North-South 32 feet and 1 ½ inches totally around 2400 sq.ft. The said suit was dismissed. Against which, the respondent has filed an appeal in A.S.506 of 2004.

3.Likewise, the suit filed by the appellant in O.S.No.8169 of 1989 for injunction in respect of suit property, which is house, ground and premises, bearing T.S.No.2/5, Block No.22 of Arumbakkam Village, viz.,No.7, New Natarajapuram, Arumbakkam, Madras 600 106 comprising 33' x 67' bounded on North by Ramamoorthy land, South by 16' Road, East by Ayyavoo Naidu vacant land and West by 16' Road with vacant land and thatched house was decreed by the trial Court, against which the

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respondent has filed the appeal in A.S.No.507 of 2004. Both the appeals were taken together by the first appellant Court and the same were allowed, against which the above second appeals have been filed.

4.The entire issue, as pointed out by the learned Senior Counsel appearing for the appellant, Mr.S.V.Jayaraman, in these two appeals revolves around Ex.A1 sale deed dated 13.12.1978 marked on the side of the respondent herein as plaintiff in O.S.No.5099 of 1991, which is the xerox copy of the sale deed, under which the respondent is stated to have purchased the suit property. The case of the plaintiff in that suit was based on the sale deed dated 13.12.78(Ex.A1).

5.On the other hand, the defendant in the suit, who is the respondent in these appeals has filed O.S.No.8169 of 1989 for an injunction while denying the averments made in the plaint, would submit that he has been living in the suit property for many years and thereafter he purchased a thatched hut for his commercial purpose and put up a compound wall and dug a well. He also put up a pucca super-structure and is in possession of the suit property for the past 25 years and it is also his case that he has perfected title by adverse possession. It is his case that the site belonged to the Government and when his house was severely affected by flood he came to this place and put up a construction and he has been in possession for more than 25 years and he would also rely upon the order of the Tahsildar, Egmore Nungambakkam Taluk dated 17.10.1988 marked as Ex.B1 to show that he has been in possession and based on the said Ex.B1 he has paid the rent to the Government on 24.07.89.

6.The trial Court decided the suit against the respondent and held that while the plaintiff in O.S.No.5099 of 1991 has chosen to produce xerox copy of the sale deed dated 13.12.78 marked as Ex.A1, he has not explained as to why he has not produced the original and finding that there was no explanation as to how Ex.A1 has to be relied on as secondary evidence and also finding that the defendants in that suit who is the appellant in these appeals has been in possession from 1975 has dismissed the said suit. The trial Court has also relied upon Ex.B1 and B2. Ex.B1 is the communication from the Government authority namely Tahsildar to show that the defendant in O.S.No.5099 of 1991 has been in lawful possession. Apart from relying upon various other documents, trial Court has also found that since the reason for adducing the secondary evidence has not been explained and the vendor under Ex.A1 has not been examined, rejected Ex.A1 under Section 65 (C) of the Indian Evidence Act as the same has not been proved. The trial Court has also taken into consideration the registration copy of Ex.A1 which was marked as Ex.A11. The trial Court has also found that even after Ex.A1, there is no evidence to prove that the plaintiff in O.S.No.5099 of 1991 has continued to be in possession and no tax has been paid etc., It was in that view of the matter, the trial Court has dismissed the suit in O.S.No.5099 of 1991 while decreeing the suit filed by the appellant in O.S.No.8169 of 1989.

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7.On the other hand, while assailing the judgments of the first appellate Court, the learned Senior counsel appearing for the appellant would submit that the first appellate Court has taken into consideration that while Ex.A1 and Ex.A11 which are the xerox copy and registration copy of the sale deed respectively dated 13.12.78 were marked before the trial court and the same were marked with the consent of the defendant and the defendant in O.S.No.5099 of 1991 has not raised any objection to the marking of the said documents. In view of the said factual findings, the appellate Court has reversed the judgment of the trial Court saying that once the defendant in the suit has not objected to the marking of Ex.A1 and Ex.A11, and in fact the same was allowed to be marked, the defendant cannot go back from the same and it was only on that basis, the first appellate Court has reversed the judgment of the trial Court, failing to refer to various other factors which were taken into consideration by the trial Court for the purpose of deciding the suits.

8.According to the learned Senior Counsel, Mr.S.V.Jayaraman, when the first appellate Court decides to reverse the judgment of the trial Court it should consider every aspect of the trial Court judgment and give independent reason. According to him, even if Ex.A1 and A11 are marked with consent, it does not amount to proving the contents of the documents. According to him, marking the document is one thing and proving the content is another. He would also contend relying upon the judgments reported in 2001 3 L.W. 308, 2001 2 TLNJ 89, 2001 2 TLNJ 312, 2002 1 TLNJ 128, 1999 LW 561 AND 2007 (1) TLNJ 464(CIVIL) to substantiate his point that the first appellant Court is expected to give reasons for each of the findings given by the trial Court in cases of reversal of the findings of the trial Court. In the present case, he would submit that the trial Court has decided not merely on the basis of non production of original of Ex.A1 but also gave many other reasons. On the other hand, the appellate Court has restricted only to the point of the validity or otherwise of the Ex.A1 alone.

9.On the other hand, Mr.S.Parthasarahty, learned Senior Counsel appearing for the respondent in these appeals would submit that Ex.A1 and A11 were marked before the trial Court not by way of proof affidavit but by taking evidence of PW1 by examining the plaintiff in O.S.No.5099 of 1991 and the defendant has not raised any objection while marking the said documents. He would submit that on the factual finding of not raising any objection about the permissibility of documents Ex.A1 and Ex.A11, the first appellate Court has come to the conclusion and there was no legal issue or substantial question of law involved in this case. He would submit that by virtue of the submission of the learned Senior Counsel for the appellant a new substantial question is sought to be raised that the first appellate Court has not given reason for each and every one of the findings of the trial Court while reversing the judgment of the trial Court. Therefore, according to him, it is not even the case of the defendant in O.S.No.5099 of 1991, who is the appellant, in the written statement disputing the title of the vendor under Ex.A1. Even while PW1

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was examined there was no cross examination to that effect. According to him, by virtue of the amended limitation Act, 1963, the second substantial question regarding limitation also goes. While admitting the second appeal, the following substantial questions of law were framed.

> (i)Whether the finding of the Lower Appellate Court that the respondent has proved the title by very production of Ex.A11, sale deed dated 13.12.1978 without any supportive and corroborate evidence is correct?
>
> (ii)Whether the respondent has proved satisfactorily that he filed the suit for declaration of title and possession within 12 years from the date of alleged trespass by the appellant to get over the period of limitation under Article 65 of the Limitation Act 1963?

10.After hearing the learned Senior Counsel appearing for the appellant, since the point is raised on behalf of the appellant that the first appellate Court while reversing the judgment of the trial Court ought to have dealt with each and every points of importance for the purpose of reversing the judgment, On the basis of hierarchy of judgments of this Court stating that the independent reasonings must be given, this Court is of the considered view that the additional substantial question of law as per Section 100(5) proviso of Code of Civil Procedure should be framed to decide the issue namely whether the appellate Court is right in reversing the judgment of the trial Court without referring to every one of the points dealt with by the trial Court by assigning reasons. In order to appreciate the third additional substantial question of law which are framed, it is necessary to state that the plaintiff in O.S.No.5099 of 1991 has come forward to enforce the right based on the document namely the sale deed said to have been executed by one Vijayaralu Naidu on 13.12.78. It is no doubt, for him to prove his ownership as per the said document especially in the circumstances that the defendant has denied the said purchase. On the other hand, it has been the case of the defendant that he has been in possession of the property, the site of which according to him belonged to the Government and his possession was for more than 25 years. It is also true that the defendant has not questioned the right of the vendor under the sale deed relied upon by the plaintiff dated 13.12.1978. A reading of the trial Court judgment shows that while dismissing the suit for declaration, the trial Court has rejected the Ex.A1 holding that the same has not been proved in accordance with law especially as per Section 65(c) of the Indian Evidence Act, since it is not explained properly as to why xeorx of Ex.A1 and Ex.A11 has been produced and original has not been produced. But the trial Court has also relied upon the evidence on the side of the defendant in the said suit to prove that the defendant has been in possession in the suit property from 1970 as per Ex.B5 and also finding that under Ex.A1 dated 13.12.78 which stated that on the date of sale, the plaintiff was put in possession of the property and he has not

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proved his subsequent possession and enjoyment with any documents by producing any tax receipts and on that basis the trial Court has come to the conclusion that based on Ex.A1, the plaintiff was not given any possession. The trial Court has also relied on the statement of PW1 stating that he has got the parent document to show how he has purchased the property from Vijayaralu Naidu. Further he has not chosen to produce the same. Therefore it is clear that the trial Court has decided not only by rejecting Ex.A1 as a secondary evidence, since it is not admissible but based on Ex.A1, the plaintiff has not proved that he has been put in possession and continued to be in possession for the purpose of obtaining the decree for declaration. In such circumstances, it is true that the first appellate court if it decides to reverse the said findings it must give proper reasonings.

11.As correctly pointed out by the learned Senior counsel appearing for the appellant, the first appeal is a valuable right of parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The Judgment of the appellate Court must, therefore, reflect a conscious application of mind as it is laid down by the Honourable Supreme Court in 2001 (3) LW 308(SANTOSH HAZARI v. PURUSHOTTAM TIWAI). The Honourable Supreme Court in the said case has laid down that first, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the finding is based on oral evidence to decide whether it suffers from material irregularity or decision arrived at inadmissible evidence and secondly the first appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. The law in this aspect has been laid down in the above said judgment as follows;-

> 15."A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate Court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect a conscious

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application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the Appellate Court. The task of an Appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi & ors v. Bijendra Narain Choudhar, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal, the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact (See Madhusudan Das v. Smt. Narayani Bai & Ors. AIR 1983 SC 114 = (1982) 95 LW 144 S.N.). The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact (See Sarju Pershad Ramdeo Sahy v. Jwaleshwai Pratap Narain Singh & Ors., AIR 1951 SC 120 = 64 LW 373). Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further

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appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune form challenge before the High Court in Second Appeal. Now the first appellate Court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in the Second Appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

That reason was also followed by this Court in 2001(2)TLNJ 89 (B.PARVATHY v. RAMAKRISHNA MISSION), 2001(2) TLNJ 312 (NAMBI IYYENGAR & ANOTHER vs. THE DISTRICT COLLECTOR & OTHERS, TIRUNELVELI) and 2002(1) TLNJ 128 (PALANISAMY SERVAI(DIED) & OTHERS vs. VEERABADRAN SERVAI(DIED) & ORTHER) and held that the first appellate Court while reversing the judgment of the trial Court ought to give independent reasonings by applying its mind independently on the evidence adduced by the parties before the trial Court. In the light of the dictum laid down by the Apex Court as well as followed by this Court consistently as stated above, when we look into the judgment of the first appellate Court, it is seen that the first appellate Court has elicited the portion of the judgment of the trial Court in respect of non production of original of Ex.A1 and on going through the original evidence of PW1, which was as follows;

நான் கிரயம் வாங்கிய காலி மனையின் டவுன் சர்வே எண் 2-5 இந்த இடத்தை பிரதிவாதிக்கு என் அனுமதியின் பேரில் நான் ஒப்படைக்கவில்லை. 13.12.1978ம் தேதியிட்ட கிரயபத்திரத்தின் புகைப்பட நகல் வா.சா.அ.1(நகல் ஒப்பிடப்பட்டது)."

and has come to a conclusion that original of Ex.A1 was produced before the Court below and it was compared and returned back to the party and in such circumstances and also the plaintiff has produced the registration copy of Ex.A1 and marked as Ex.A11 the non production of original of Ex.A1 does not arise.

12.The appellate Court also proceeds to say that when Ex.A1 and Ex.A11 were produced through the plaintiff while examining him as PW1, there was no objection on behalf of the defendant for marking the documents. Further the first appellate Court proceeds to examine about the identity of the suit property also and has come to the conclusion that the

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plaintiff has proved his title. Further the first appellate Court has also narrated and discussed about the claim of adverse possession raised by the plaintiff in O.S.No.8169 of 1989. In such circumstances, the non consideration by the appellate court about the non examination of vendor of the plaintiff under Ex.A1 can itself not be considered to be against law especially when the first appellate Court has found categorically that the plaintiff has proved his title.

13.The further question was as to the admissibility of Ex.A1 and Ex.A11 under Section 65 of the Indian Evidence Act. Section 65(c) which applies to the facts of this case reads as follows;-

> "When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

Shows under what circumstances the secondary evidence can be relied upon and admissible in respect of the contents thereto. As pointed out by the Honourable Supreme Court, the objection to the admissibility of the document can be raised either on the basis 1)that it is inadmissible or (2) objection directed not against the admissibility of the document but against the mode of proof thereof on the ground of irregularity or insufficiency as laid down by the Honourable Supreme Court in 2003 8 SCC 752 (R.V.E. VENKATACHALA GOUNDER v. ARULMIGH VISWESARASWAMI & V.P.TEMPLE) which is as follows;-

> 20."The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the above said case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:(i) an objection that the document in evidence which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in

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appeal or revision. In the later case, the objection should be taken when the evidence and marked as an exhibit, the objection that it should not have been irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior Court."

14.Therefore, the admissibility of Ex.A1 falls under the later category and a reference to the judgment of the appellate Court and it is also admitted shows when Ex.A1 and Ex. A11 were produced through PW1 the same was not objected to especially when it is stated that the original was compared. Therefore, it is clear that it is not open to the defendant in the said suit subsequently to object especially in the circumstances that it is not even the case of the defendant in the suit that the predecessor in title of the plaintiff under Ex.A1 have no right, since the claim of the respondent in his suit for injunction is that he has been in possession for more than 25 years, which has been found favour by the trial Court and it is not even the pleading of the defendant in O.S.5099 of 1991 in his written statement questioning the right of the vendor under Ex.A1.

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15.In view of the above said facts, I do not see that the appellate Court is wrong in appreciating Ex.A1 and Ex.A11 as far as the plea of adverse possession by plaintiff in O.S.No.8169 of 1989 who is the appellant herein.

16.It is also relevant to point out that when once the document is admitted in a proper form and especially in the present case without objection, the contents are also deemed to be proved if not a conclusive evidence as held by the Honourable Supreme Court in AIR 1972 SCC 608 (P.C.PURUSHOTHAMA v. S.PERUMAL) in para numbers 18 and 19 as follows;-

> 18."Before leaving this case is necessary to refer to one of the contentions taken by Mr.Ramamurthi, learned Counsel for the respondent. He contended that the Police reports referred to earlier are inadmissible in evidence as the Head Constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility-see BHAGAT RAM v. KHETU RAM, AIR 1929 PC 110.
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> 19.It was next urged that even if the reports in question are admissible we cannot look into the contents of those documents. This contention is again unacceptable. Once a document is properly admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence."

The appellate Court has in fact in detail discussed about the same and given reasons. In view of the same, the substantial question of law are answered against the appellant and the appeals fail and the same are dismissed. No costs.

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To

1. The Additional District and sessions Judge,
Fast Track Court, III, Chennai

2. The VI Assistant Judge, City Civil Court, Chennai

3. The Record Keeper, V./R. Section, High Court, Chennai.

+ Two CC to Mr. S. Vijayaraghavan Advocate sR 24604& 24605

+ Two CC to Mr. K.v. Sundararajan Advocatae sR 24922 & 24923
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